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SUPREME COURT U.S.
OCT 25 1985

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Case No. 85-331

THOMAS ISRAEL, and
WISCONSIN ATTORNEY GENERAL,

Petitioners,

v.

ROBERT WALBERG,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Robert Walberg respectfully requests denial of the petition for writ of certiorari, seeking review of the opinion reported as follows: Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985).

JURISDICTION

Respondent doesn't take issue with petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with petitioner's statement of same.

STATEMENT OF THE CASE

Petitioners' recitation of facts is accurate as far as it goes, but nonetheless omits certain pertinent facts. Respondent's statement herein is therefore intended to supplement petitioners'. (From respondent's perspective, petitioners incompletely portray, inter alia, the judicial threats to trial counsel's economic status.)

During the presentation of evidence at the suppression hearing, the presiding judge, Honorable Christ T. Seraphim, several times interrupted defense counsel, Donald Clark, and in the words of the state supreme court, Judge Seraphim "expressed irritation with defense counsel because he believed he was wasting the court's time and the taxpayer's money with 'frivolous' objections and motions, and with his habit of asking too many questions." State v. Walberg, 109 Wis. 2d 96, 98, 325 N.W.2d 687, 689 (1982).

Judge Seraphim accused Clark of "running up a bill of thirty dollars an hour." Answer: Exh. O: 84. The judge spontaneously criticized a prosecution witness who gave evidence favorable to the defense theory. Judge Seraphim also told this witness that a prior prosecution witness had given different testimony, even though the judge had previously imposed a sequestration order. Answer: Exh. O: 85.

During respondent's direct examination, the judge sarcastically interposed his own answers to questions relating to respondent's mental and physical condition during interrogation. Answer: Exh. O: 140. See also 766 F.2d at 1073. In petitioner's view, these remarks "allegedly ridicul(ed) Walberg's testimony," and were but evidence of the judge's "blunt style." Petition for Writ of Certiorari, pp. 10, 11. However, the Seventh Circuit viewed it as "his

bizarre conduct in answering questions put to Walberg before Walberg could answer . . . ." 766 P.2d at 1077.

During argument on the motion to suppress, the judge badgered Clark into stating, "as an officer of the court" an opinion unfavorable to the defense theory. Judge Seraphim reiterated that he was "getting awfully irritated at you Mr. Clark." Answer: Exh. O: 152-154. The judge referred to the codefendant being tried separately as "a known burglar who unfortunately isn't going to be tried in this court." Id.

Petitioners do recount the most serious judicial outburst. Pet., pp. 11-16. However, petitioners don't mention that the Wisconsin Supreme Court held that this conduct violated Standards 6 and 9 of the Wisconsin Code of Judicial Ethics. In Matter of Complaint Against Seraphim, 99 Wis. 2d 485, 294 N.W.2d 485 (1980) (see 99 Wis. 2d at 490, 294 N.W.2d at 489 for a description of these Standards). Answer: Exh. K: 11-12. For this, and egregious misconduct in other cases, Judge Seraphim was removed from the bench for three years by the Wisconsin Supreme Court.

At his disciplinary hearing, Judge Seraphim was questioned about his behavior in the present case. He told the disciplinary panel "that he intended to put defendant's counsel on notice that he was not going to pay him for bringing motions that had no merit . . . ." The panel also noted: "When respondent told counsel that his conduct would get him nowhere in the courts of Milwaukee, he intended to let counsel know that he was going to tell other judges how he practiced law." Answer: Exh. K: 11.

In this regard, though petitioners don't mention it, Clark's status was as a judicially appointed counsel for respondent. Under the then-existing system (since supplanted

by a state-wide public defender system), attorneys were appointed for indigent criminal defendants by local judges. The appointing judge was also responsible for approval (or rejection) of appointed counsel's post-trial bill for services. See generally, States ex rel. Milwaukee County v. WCCJ, 73 Wis. 2d 237, 243 N.W.2d 485 (1976). As one state supreme court justice has noted, "(t)here may have been deficiencies in [this] system, including allegations of patronage . . . ." State v. Pelton, 110 Wis. 2d 485, 520, 329 N.W.2d 161, 177 (1983) (Steinmetz, J., concurring).

Petitioners don't really discuss the state supreme court's affirmance of respondent's conviction. The court found that Judge Seraphim erred in failing ro recuse himself, and that respondent was thus denied his right to an impartial judge. Nonetheless, the court found this error harmless (respondent had contended, inter alia, that the harmless error rule was inapplicable to a denial of the right to an impartial judge). 109 Wis. 2d at 108, 325 N.W.2d at 694.

The state supreme court summarized the net effect of Judge Seraphim's unethical conduct in the following terms:

> The court in effect, was telling defense counsel he must choose between bringing the motions and obtaining a fair trial for the defendant. He further appeared to be threatening counsel's personal and economic interests if he continued defending his client by bringing motions and voicing objections.

109 Wis. 2d at 108-109, 325 N.W.2d at 694.

The Seventh Circuit's decision is discussed more fully below. Respondent disagrees with petitioners' interpretation that the decision articulates a novel standard dealing with "governmental rectitude." Rather, as argued below, the decision merely finds the existence of a conflict of interest based on the express judicial threats to counsel's economic and professional stature.

Finally, petitioners' statement of facts implies that counsel's motion practice was "caviling" and dilatory, and that Judge Seraphim was only motivated by an interest in moving the case along. Petition for Writ of Certiorari, p. 10. However, the Wisconsin Court of Appeals "conclude(d) that Walberg's counsel responded coolly, calmly, and courteously to the trial court's onslaught . . . ." Answer: Exh. I: 3. Further, the judicial disciplinary action implicitly exonerated counsel of any blame for the judge's behavior. Standard 9 allows a judge to "properly intervene whenever he considers it necessary to . . . expedite the proceedings." In finding a violation of this Standard, the state supreme court of course implicitly found that any intervention on this basis was unjustified and improper.

ARGUMENT

THE DECISION BELOW IS CONSISTENT WITH WELL-ESTABLISHED PRECEDENT, NAMLY THAT WHERE A CONFLICT OF INTEREST EXISTS, THE DEFENDANT NEED NOT SHOW PREJUDICE, AND THE HARMLESS ERROR RULE IS INAPPLICABLE. SEEN IN ITS CORRECT LIGHT, THE DECISION BELOW PRESENTS MERELY A FACT-SPECIFIC CASE DEALING WITH THE CREATION OF A CONFLICT OF INTEREST DUE TO THREATS TO RESPONDENT'S ATTORNEY'S ECONOMIC AND PROFESSIONAL STATURE.

This court has long recognized that "(i)n certain Sixth Amendment contexts, prejudice is presumed." Strickland v. Washington, 80 L.Ed.2d 674, 696, 104 S.Ct. 2052 (1984). Such instances include "various kinds of state interference with counsel's assistance." Id. Another is a conflict of interest. Id. No burden of showing prejudice is imposed on the defendant in such contexts.

In the first instance, petitioners drastically misrepresent the holding (as discussed below), and fail to acknowledge that this case involves only the mundane issue of a conflict of interest in a discrete, non-recurring factual context. There can be no doubt on this point; the Seventh

Circuit explicitly and repeatedly noted the existence of a conflict. For example:

> [Clark] had a conflict of interest, not between two clients having conflicting defenses but between his client and himself. They had conflicting incentives -- Walberg to get off by any means, Clark to preserve so far as possible his relationship with a judge who regarded himself, apparently with some basis, as Clark's benefactor.

766 F.2d at 1074-1075.

> The judge . . . went far. He accused Clark of ingratitude; he made a thinly veiled threat not to approve Clark's fee request at the end of the trial; he reminded Clark of Clark's dependence on his good will. The circumstances made the conflict of interest between Clark and his client too serious to be excused just because Walberg cannot show what more Clark would have done in Walberg's defense.

Id., at 1075.

Petitioners do not claim that further review is necessary to refine the law on conflicts of interest. Yet, this case involves nothing if not a conflict of interest, and petitioners' failure to grasp that fact makes their petition largely irrelevant.

Properly framed, the issue herein is really whether, under the peculiar facts at hand, the Seventh Circuit correctly perceived a conflict. Yet, framed in this way, the issue is revealed for the thoroughly factbound case that it is.

However, petitioners repeatedly contend that the decision "creates a new per se standard" for evaluating Sixth Amendment claims, namely "governmental rectitude." Petitioners have simply manufactured this standard, inasmuch as the phrase "governmental rectitude" appears nowhere in the opinion, wasn't asserted by respondent Walberg at any time, and indeed has nothing to do with the holding.

Having constructed this false issue, petitioners use it as a foundation for their second-tier argument: that the

decision allegedly employs a Fourth Amendment exclusionary rule analysis; the defendant may now go free under the Sixth Amendment simply because a magistrate has "blundered." E.g., Pet., pp. 17-21.

The phrase "governmental rectitude" has the advantage of piquancy, but suffers the disability of irrelevancy to the analysis utilized by the Seventh Circuit. Respondent wasn't granted relief merely due to some judicial "blunder." As noted above, relief was granted because the judge's malicious interference with the attorney-client relationship created a conflict of interest. Interference of that magnitude is a far cry from the blundering attendant some technical Fourth Amendment transgression.

The judge didn't merely "blunder," or suffer some small loss of "rectitude." Rather, as the Seventh Circuit noted:

> But Judge Seraphim went far beyond the bounds of permissible criticism of a lawyer's tactics when he accused Clark of personal ingratitude. And he implied, or could be understood to be implying that he was angry at the lawyer because the client was unworthy of the protracted efforts that the lawyer was making on his behalf. The judge's partiality at the suppression hearing, his bizarre conduct in answering questions put to Walberg before Walberg could answer, his insistence that the defendant's lawyer owed his first allegiance to the judge as a family friend and benefactor, his congratulating the jury on their speed, and the haste with which he imposed an exceedingly severe sentence, when taken all together, show that Judge Seraphim committed an egregious breach of judicial decorum.

766 F.2d at 1077.

The state supreme court found a violation in the code of judicial ethics due to this behavior. Judge Seraphim, it must be stressed, also threatened to blacklist defense counsel in local courts; threatened to limit payment of his bills in this case; threatened "to fix" counsel at trial; and told counsel he'd have to choose between a fair trial for respondent and his motion practice. To petitioners this behavior may smack

only of some technical violation, but the Seventh Circuit viewed the conduct with a more discerning, and less partisan eye, and came to a radically different conclusion.

As a related matter, petitioners also assert that "the Seventh Circuit's test requires reversal and a new trial simply because a judge exhibits inappropriate testiness." Pet., p. 19. Petitioners are probably the only observers who have characterized the judge's unethical behavior so euphemistically. Their view advances their claim that he merely blundered, but it is at odds with the facts. Nonetheless, this euphemism exposes the Achilles heel of petitioners' argument.

The case boils down to petitioners' disagreement with the Seventh Circuit as to how to characterize the judge's behavior. Was he merely testy, as petitioners assert, or did his unethical threats unlawfully interfere with the relationship between counsel and client so as to create a conflict of interest, as the Seventh Circuit held?

When all is said and done, the only real question is whether a conflict of interest was created. In turn, that question involves only a dispute as to factual characterizations, not one of broad-based legal principles.

Petitioners, it bears emphasis, have not sought review of the existence of a conflict of interest. Instead, petitioners claim only that "testy" or "blundering" judges don't obviate the need for showing prejudice.*/ But that isn't the real

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*/ Petitioners have not, for example, claimed that the Seventh Circuit employed an improper methodology in finding the conflict, or that the decision goes astray from other conflict cases. Petitioners instead, somewhat inexplicably and intransigently, don't even acknowledge that the court found a conflict. Rather, petitioners assert only that mere judicial testiness or blundering isn't enough to relieve the defendant of the burden of proving prejudice--an assertion that is in no way inconsistent with the decision below.

question, which is whether, under the nonrecurrent facts at hand, the judge's vituperative threats to counsel's economic and professional stature, created a conflict of interest. This question of course, hardly involves novel issues of law.

Certain other matters raised by petitioners deserve but passing response. Petitioners claim that the lower court's failure to apply a harmless error analysis is a serious departure from prior decisions by this Court. Pet., pp. 22-24. However, this contention stems from petitioners unwillingness to accept the Seventh Circuit's finding of a conflict of interest.

It is beyond dispute that the existence of a conflict obviates the need to show prejudice. E.g., Holloway v. Arkansas, 435 U.S. 475 (1978). Petitioners note that Holloway involved an objected-to conflict, but that fact doesn't render the case distinguishable; the lower court here found an actual conflict of interest, which certainly places the case on the same footing as an objected-to conflict.

Of course, when a conflict is found, the harmless error rule is inapplicable, in part "because of what [the conflict] tends to prevent the attorney from doing . . . . [T]he evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process . . . . And to assess the impact of a conflict of interests on the attorneys options, tactics, and decisions, in plea negotiations would be virtually impossible." Holloway, 435 U.S. at 488, 489, 490.

This passage also addresses petitioners' false concern about "a rule of . . . per se harm flowing from error arising only at pretrial stages." Pet., p. 18. Clearly, a conflict arising at a pretrial stage infects later proceedings, as the quote above from Holloway amply demonstrates.

II. THE DECISION BELOW CAN BE AFFIRMED ON INDEPENDENT BASES, THUS MAKING IT INAPPROPRIATE FOR CERTIORARI ON THE ISSUES RAISED BY PETITIONERS.

The decision below can be affirmed on an independent ground--namely that there was an objected-to conflict of interest. As noted above, the Seventh Circuit found the existence of an actual conflict. However, respondent also argued below that his attorney had objected to the conflict, and the failure to take ameliorative action in the face of the objection warranted habeas relief. The Seventh Circuit found it unnecessary to reach this argument, given its conclusion of an actual conflict, but nontheless the court implied agreement with it:

> Clark moved to recuse Judge Seraphim on the ground that "if this case should proceed with Judge Seraphim presiding defendant will be denied the effective assistance of counsel"; and with the judge thus alerted to the conflict, maybe his refusal to recuse himself was reversible error even if harmless, under the cases we have cited. But there is no need to pursue this approach further; . . . .

766 F.2d at 1075-1076.

There can be no dispute that, where no action is taken on a conflict-based objection, the harmless error rule is inapplicable. Holloway. In this context, it is unimportant "whether the alleged conflict actually existed." Rather, the trial court's failure to resolve the conflict is itself "error [which] unconstitutionally endanger[s] the right to counsel." Cuyler v. Sullivan, 446 U.S. 335, 345 (1980). Thus:

> A constitutional violation occurs, and proof of an actual conflict is not required, when a defendant's attorney objects to joint representation and the trial court overrules the objection without exploring the basis of the objection or the adequacy of the representaion in the face of a potential conflict of interest . . . . Absent an inquiry by the trial judge that reveals the objection to be specious, the objection itself is sufficient evidence that an actual conflict of interest affected counsel's performance.

Wilson v. Moran, 774 F.2d 591, 593, 594 (7th Cir. 1984, en banc). Accord, Zembowski v. Roberts, 771 F.2d 1057 (7th Cir. 1985).

As noted above, Clark asked Judge Seraphim to recuse himself after the final threat (to "fix" Clark at trial). Respondent contends that this motion was sufficient to alert Judge Seraphim to the possibility of a conflict--namely that Clark felt that his representation of Walberg was being interfered with by the judge.

The case thus reduces to a thoroughly pedestrian issue: whether Clark sufficiently lodged a conflict-based objection so as to bring respondent within the ambit of Holloway. The record clearly supports a positive answer, but that's not even really the point; the issue isn't novel, indeed, to the contrary, it is dependent only on the application of well-settled law to particular facts.

Further, the decision below can be affirmed on the ground that Walberg's fourteenth amendment right to an unbiased magistrate was denied by Judge Seraphim's failure to recuse himself. The Seventh Circuit, while not reaching this issue, did note: "It is possible but less certain that Walberg was also deprived of a far older right than the right to the effective assistance of counsel--the right to an unbiased judge." 766 F.2d at 1076.

The facts have been thoroughly discussed, and they speak for themselves. Walberg's point is simply that the decision below can be affirmed on the theory of denial of an unbiased judge, and that this Court should not utilize its resources to discuss such a well-settled theory.

CONCLUSION

For the reasons discussed above, the petition for writ of certiorari should be denied.

Date: October 25, 1985.

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